88-1557

Supreme Court, U.S.
FILED
MAR 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HILLVIEW ESTATES, LTD.,

Petitioner,

vs.

MO-CON VENTURES, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND DISTRICT, SIXTH DIVISION

PETITION FOR WRIT OF CERTIORARI

C. RUSSELL KING, ESQ.
P.O. Box 888
126 North 8th Street
Santa Paula, California 93060
(805) 525-7138

Attorney for Petitioner
HILLVIEW ESTATES, LTD.

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

QUESTIONS PRESENTED

This petition for writ of certiorari involves petitioner's motions below to extend for a period of 81 days the mandatory period of five years in which to bring its civil action to trial.

The questions presented are:

1. Was there an implied-in-law stay of prosecution for the period of time (81 days) between the date (July 8, 1982) petitioner's attorneys, pursuant to 11 USC 327(e) mailed their Application Of Debtor In Possession Chapter 11 bankruptcy For Authority To Employ Attorneys, and Order Thereon ("Application"), and the date (September 27, 1982) it was approved by the bankruptcy judge, Calvin Ashland?

2. If that 81 day period qualifies as an implied-in-law stay of prosecution did it extend by 81 days the five-year period for bringing petitioner's action to trial?

3. To obtain an extension of that period of 81 days, was petitioner required to show due diligence in prosecuting its action at all other times during the five-year period after filing its complaint in the Ventura County Superior Court on January 7, 1982?

4. Was there any evidence to support the Court of Appeal decision stating that petitioner had changed the number of the bankruptcy case on its Application after it had been mailed thereby delaying the progress of that Application in the bankruptcy court?

5. Did the Court of Appeal deny petitioner due process of law and equal protection of the law (28 USC, Amendment 14) in egregiously misstating the evidence to indicate that petitioner delayed the progress of that Application in the bankruptcy court?

6. If the California Court of Appeals denied petitioner due process of law, did its affirming the trial court's dismissal of petitioner's action result in a miscarriage of justice thereby denying petitioner its day in court?

7. Would the orderly administration of justice in California be enhanced by this court's granting petitioner's petition for writ of certiorari to determine whether petitioner is entitled to the 81 day extension of the five-year period in which to bring its action

to trial as authorized by California Civil Procedure §583.340(b) enacted in 1984, effective January 1, 1985?

LIST OF PARTIES

The parties to the proceedings are petitioner HILLVIEW ESTATES, LTD., a limited partnership, organized under the laws of the State of California, and respondents: MO-CON VENTURES, INC.; GAP DEVELOPMENTS, INC.; TWO C MOBILEHOME SALES, INC.; SECURITY PACIFIC NATIONAL BANK; CHARLES A. GILLIARD; JOSEPH R. ALSIP; ROBERT PLACENCIA; CARROLL D. COURTNIER; EDWARD A. SKIFSTROM; ROBERT D. PATTERSON; and EQUITABLE DEED COMPANY.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	iv
TABLE OF AUTHORITIES	xi
OPINIONS BELOW	2
JURISDICTION	3
STATUTES INVOLVED	4
STATEMENT OF THE CASE	5
A. CHRONOLOGICAL LIST OF PERTINENT DATES	5
B. BACKGROUND OF CASE	10
C. BASIS FOR PETITIONER'S MOTIONS FOR 81 DAY EXTENSION OF TIME BEYOND THE FIVE-YEAR PERIOD FOR BRINGING ITS ACTION TO TRIAL	15
1. THE STATUTORY TIME REQUIREMENT FOR BRINGING AN ACTION TO TRIAL WITHIN FIVE YEARS AND STATUTORY EXCLUSIONS FROM THAT TIME ARE DESCRIBED BELOW	15

PAGE

2. PETITIONER'S COMPLYING WITH THE PROVISION OF BANKRUPTCY STATUTE 11 USC §327(e) RESULTED IN AN IMPLIED STAY OF PROSECUTION FOR 81 DAYS 17

3. STATUTORY AND CASE LAW AUTHORIZED THE COURTS TO GRANT PETITIONER'S MOTION FOR AN EXTENSION OF THE FIVE-YEAR PERIOD IN WHICH TO BRING ITS ACTION TO TRIAL 28

4. PETITIONER WAS NOT REQUIRED TO SHOW DUE DILIGENCE OF PROSECUTION FOR THE 81 DAY EXTENSION OF TIME 33

D. THE CONSTITUTIONAL VIOLATION OF THE DECISION OF THE COURT OF APPEAL WAS RAISED BY PETITIONER AT THE EARLIEST OPPORTUNITY..... 36

E. CALIFORNIA COURTS ARE UN CERTAIN AND CONFUSING IN THEIR DECISIONS FOR THE REQUIREMENTS OF A STAY OF PROSECUTION TO ENTITLE AN APPLICANT FOR EXTENSION OF TIME TO BRING ITS ACTION FOR TRIAL 39

REASONS FOR GRANTING THE WRIT 41

PAGE

I THE INTERPRETATION OF A FEDERAL BANKRUPTCY STATUTE 11 USC §327(e) IS REQUIRED TO DETERMINE WHETHER COMPLIANCE WITH ITS PROVISION EFFECTS A STAY OF PROSECUTION OF AN ACTION IN A STATE COURT ACTION 41

II THE REVIEW OF PETITIONER'S MOTIONS BY THIS COURT WOULD CORRECT THE EGREGIOUS ERROR OF THE COURT IN MISSTATING THE EVIDENCE, THUS VIOLATED PETITIONER'S DUE PROCESS RIGHTS, THAT RESULTED IN A MISCARRIAGE OF JUSTICE 43

III BY ITS REVIEW OF PETITIONER'S MOTION FOR EXTENSION OF TIME IN WHICH TO BRING ITS ACTION TO TRIAL, THIS COURT WILL ENHANCE THE ORDERLY ADMINISTRATION OF JUSTICE IN CALIFORNIA 44

CONCLUSION 45

PAGE

APPENDIX A

Order of California Supreme Court Opinion Denying Appellant's Petition for Review Filed December 21, 1988..... A-1

APPENDIX B

California Court of Appeals, Second District Sixth Division Unpublished Opinion, Denying Appellant's Petition for Reversal of the Trial Court's Dismissal of Petitioner's Action in the Ventura County Superior Court, (Filed October 5, 1988)..... B-1

APPENDIX C

Application of Debtor-In-Possession for Authority to Employ Attorneys, and Order Thereon, "Original," (handwritten "82" above the typed case number "LA 07202 CA"); file stamped "Sep 27 1982," "Lodged 1982 Sep 27," and "Entered Oct 6 1982."* This was submitted by respondent Security Pacific National Bank with the Affidavit of Jill L. Jasper (App. "E")

*Note: The file stamp "Entered Oct 6 1982" is placed in a different place than on the "Copy" (App. D)..... C-1

PAGE

APPENDIX D

Application of Debtor-In-Possession for Authority to Employ Attorneys, and Order Thereon, "Copy," (handwritten "LA 82-07202 CA" above typed case number "LA 07202-CA" that has a line through it); file stamped "Sep 27 1982," "Lodged 1982 Sep 27," and "Entered Oct 6 1982."* Submitted by petitioner's attorneys.

*Note: The file stamp "Entered Oct 6 1982" is placed in a different place than on the "Original" (App. C) D-1

APPENDIX E

Declaration of Jill L. Jasper (less attachments) dated January 20, 1987, submitted by defendant SECURITY BANK's Notice of Motion to Dismiss Complaint for Failure to Bring Complaint to Trial, etc. filed January 23, 1987, in the Ventura County Superior Court ... E-1

APPENDIX F

Petitioner's Request for Findings of Fact submitted with petitioner's Petition for Review dated October 20, 1988.... F-1

PAGE

APPENDIX G

Court of Appeals, Second
District Sixth Division denial
of petitioner's Petition for
Rehearing and Request for
Findings of Fact dated
November 1, 1988 ..... G-1

TABLE OF AUTHORITIES

PAGE

CASES

Byerly v. Sale
(September 1988)
204 Cal.App.3d, 1312,
__ Cal. Rptr.___ 40

Davis v. Thayer (1980)
113 Cal.App.3d 892, 903;
170 Cal.Rptr. 328 ..... 30, 31

Ex parte Virginia
(1880) 100 U.S. 339,
25 L.Ed. 676 38

Herring v. Peterson (1981)
116 Cal.App.3d 608, 613;
172 Cal.Rptr. 240 35

In Re Carl Johnson (1982)
21 Bankruptcy Rules,
Lawyers' Edition 217 ..... 26, 27

Hale v. Morgan
(1978) 22 Cal.3d 388, 394;
149 Cal. Rptr. 375,
584 P2d 512 38

Kaye v. Mount La Jolla
Homeowners Assn. (1988)
199 Cal.App.3d 111, 122 ... 32, 33

Salas v. Sears, Roebuck & Co.
(1986) 42 Cal.3d 342,
228 Cal. Rptr. 504 36

PAGE

CONSTITUTIONS

Constitution of the United States, 14th Amendment, Section 1 37

California Constitution, Article 1, §7 37

FEDERAL STATUTES

11 USC 327(e) 6, 12, 17, 18, 39, 41, 42, 45, 46, 47

11 USC 362(a) 19, 26

STATE STATUTES

California Code of Civil Procedure

§17(4)..... 30, 31

§473 30

§583 (repealed 1/1/85)..... 33, 34

§583.130 29

§583.310 15

§583.340 ..... 33, 34

Law Revision Commission Comment, 1984 Addition, West's Annotated Codes 28
28

§583.340(a) 16, 34

PAGE

§583.340(b) 16, 41, 44

§583.340(c) 36, 39, 41, 45

§583.340(f)..... 34

California Rules of Court
Rule 23 ..... 22, 37

Government Code §6803 30

TEXT

1 Witkin California Evidence
3d., §230 25

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1988

HILLVIEW ESTATES, LTD.,
a limited partnership,
Petitioner,

vs.

MO-CON VENTURES, INC.,
GAP DEVELOPMENTS, INC.,
TWO C MOBILEHOME SALES, INC.,
SECURITY PACIFIC NATIONAL BANK,
CHARLES A. GILLIARD,
JOSEPH R. ALSIP,
ROBERT PLACENCIA,
CARROLL D. COURTNIER,
EDWARD A. SKIFSTROM,
ROBERT D. PATTERSON, and
EQUITABLE DEED COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner, HILLVIEW ESTATES, LTD., a limited partnership, respectfully prays that a writ of certiorari be issued to review judgment of an un-

published opinion of the California Court of Appeals, Second District, Sixth Division entered in the above-entitled proceeding on November 1, 1988, affirming the dismissal on February 13, 1987, of petitioner's action by the Ventura County Superior Court, the Honorable Marvin H. Lewis.

OPINIONS BELOW

The California Court of Appeal, Second District, Sixth Division, rendered its unpublished opinion on October 5, 1988. That opinion is reprinted in Appendix "B" attached hereto.

The California Court of Appeal, Second District, Sixth Division, denied petitioner's petition for rehearing and request for findings of fact on November 1, 1988. That denial is reprinted in Appendix "G" attached hereto.

The California Supreme Court denied

petitioner's petition for review on December 21, 1988. That denial is reprinted in Appendix "A' attached hereto.

JURISDICTION

Petitioner originally brought this action in the Superior Court, County of Ventura, State of California, on January 7, 1982. Thereafter petitioner filed his petition of bankruptcy in the United States Bankruptcy Court, Central District, Los Angeles, California.

Thereafter the Ventura County Superior Court, State of California, the Honorable Marvin Lewis denied petitioner's motions from which petitioner appealed to the California Court of Appeal, Second District, Sixth Division. That court in its unpublished opinion, affirmed the trial court denial of those motions and affirmed its dismissal of petitioner's action

against respondents.

Thereafter, the Supreme Court of the State of California denied petitioners petition for a writ of review.

The jurisdiction of this court is invoked under the provisions of 28 USC 1257(3).

STATUTES INVOLVED

Constitution of the United States, Fourteenth Amendment, Section 1;

California Constitution, Article 1, §7;

Federal bankruptcy statutes 11 USC §327(e) and §362(a),

California Code of Civil Procedure, §17; §473; §583, (Repealed effective January 1, 1985; §583.130; §583.310; §583.340, §583.340(a); §583.340(b); §583.340(c); (all effective January 1, 1985)

California Rules of Court, Rule 23

STATEMENT OF THE CASE

A. CHRONOLOGICAL LIST OF PERTINENT DATES.

For the convenience of the reader, set forth at this point is a chronological list of the events of the case that are pertinent to this petition.

January 7, 1982

Hillview filed its complaint against all defendants in the Ventura County Superior Court action #75606.

May 3, 1982

Hillview filed its Chapter 11, debtor-in-possession petition in the U.S. Bankruptcy Court, Central District of California, case #LA-82-07202-CA.

May 17, 1982

Trustee mailed petitioner a "Notice of Requirements of United States Trustee of Debtor-In-Possession in Chapter 11 Case," including the requirements of

11 USC 327(e), the requirement that petitionor apply to the bankruptcy court for approval to employ its attorneys to prosecute its action in the Ventura County Superior Court.

July 8, 1982

Petitioner's attorneys mailed to the bankruptcy court the required Application so that those attorneys could prosecute petitioner's action against all defendants in Ventura County Superior Court, action #75606.

July 12, 1982

Attorney Anson Whitfield's affidavit states that the Application when returned to him showed that the trustee file-stamped the Application on July 12, 1982, and that Whitfield's office did nothing more on that Application after mailing it July 8, 1982.

Sept 27, 1982 (81 days after the Application was mailed.)

Bankruptcy court by order of Judge Calvin Ashland approved the employment of those attorneys to prosecute petitioner's action against defendants in the Ventura County Superior Court.

October 6, 1982

Face page of the Application shows a file stamp of October 6, 1982, as the date on which it was "Entered."

December 20, 1982

Bankruptcy court dismissed petitioner's Chapter 11 Debtor-In-Possession petition in bankruptcy.

December 17, 1986

Petitioner filed its motions in the Ventura County Superior Court for order shortening time and for special trial setting to be heard January 2, 1987.

January 7, 1987

Five years after date of filing of petitioner's complaint, Ventura County Superior Court #75606.

January 16, 1987

Petitioner filed its Second Amended Motions for Extension of Time, and for special trial setting.

February 13, 1987

Ventura County Superior Court denied petitioner's Motions for Extension of Time, and for special trial setting.

February 23, 1987

Petitioner filed in the trial court its Notice of Motion, and Motion for Reconsideration, etc., originally set for March 12, 1987; heard March 19, 1987.

March 4, 1987

Order filed dismissing petitioner's complaint, Ventura County Superior Court.

NOTE: The discussion hereinafter refers to the period of 81 days that petitioner alleges was excluded from the five-year period in which statutory law required it to bring its action to trial. Therefore, that 81 day period should have extended the end of the five-year period from January 7, 1987, to March 29, 1987, for petitioner to bring its action to trial. Petitioner waived 37 of those 81 days by continuances and amended pleadings. Petitioner moved the California Court of Appeal to reverse the trial court's dismissal, and for an order to the trial after remittitur court to specially set the trial within the remaining 44 days of that 81-day period. That court affirmed the trial court's dismissal of the action so that that argument on that issue became moot.

B. BACKGROUND OF CASE

In 1979, realtor and developer, Dale Wilson, ("Wilson"), purchased approximately 22 acres of land near the City of Santa Paula, County of Ventura, State of California. The purchase price exceeded $600,000.

Shortly thereafter, Wilson entered into a partnership agreement with others to develop that property into a condominium/mobilehome park, called HILLVIEW ESTATES, LTD., petitioner herein. A construction loan was arranged for $2,000,000 from respondent SECURITY PACIFIC NATIONAL BANK ("SECURITY"), as lender, and respondent EQUITABLE DEED COMPANY ("EQUITABLE") as a trustee.

The partnership gave SECURITY a trust deed on the property. In 1980, construction of the mobilehome park commenced, and, in that year and the

next, petitioner borrowed almost all the $2,000,000 of the construction loan.

Dissension developed between the partners. Wilson became the sole general partner of the partnership; he believed that excessive amounts of monies had been borrowed without his knowledge and without his signature, as required by the agreement with respondent SECURITY. Wilson also believed that all partners of petitioner had retained a large portion of the construction loans, and that SECURITY knew that its loans had not been entirely used for construction of the project.

On January 7, 1982, Wilson filed petitioner's complaint action #75606 in the Ventura County Superior Court alleging fraud, breach of contract, and conspiracy by defendants/respondents.

Meanwhile, SECURITY and EQUITABLE foreclosed on the partially developed property, thus, petitionor lost its investment in both the property and the constacted improvements on that property.

Shortly thereafter, petitioner filed a Chapter 11 Debtor-in-Possession petition in bankruptcy in the United States Bankruptcy Court, Cencral District, Los Angeles, California, as case #LA-82-07202-CA.

Thereafter, pursuant to the requirements of 11 USC 327(e), the attorneys who filed the action then filed their Application for employment of attorneys so that they could proceed in the Ventura County Superior Court action. That Application was mailed on July 8, 1982; it was received in the bankruptcy trustee's office July 12, 1982, and signed by the bankruptcy judge, Calvin

Ashland on September 27, 1982, 81 days after that Application had been mailed on July 8, 1982. Therefore, petitioner had no one to represent it during that 81 day period in its Ventura County Superior Court action.

On the day after mailing its Application to the bankruptcy court, respondents, in the Ventura County Superior Court action, obtained a stay of discovery by order of that court.

That stay was ordered to remain in effect until petitioner's attorneys' application had been approved by judge and petitioner had answered the interrogatories of defendant/respondent CHARLES A. GILLIARD. That stay remained in effect until July, 1986, when petitioner answered those interrogatories. Prior to that time petitioner had substituted several attorneys between

July, 1982, to July, 1986. Petitioner asserted that the several substituted attorneys were required to remove themselves after several months of work done by each because of factors beyond the control of petitioner.

After substituting its present attorney in December, 1985, petitioner proceeded diligently in 1986 to answer the interrogatories of respondent CHARLES A. GILLIARD, proposed interrogatories to respondent SECURITY, and took the depositions of SECURITY's officers who had made the loan payments on the $2,000,000 construction loan in 1980 and 1981.

The petitioner made its motion for extension of time for 81 days as related below.

C. BASIS FOR PETITIONER'S MOTIONS FOR 81 DAY EXTENSION OF TIME BEYOND THE FIVEYEAR PERIOD FOR BRINGING ITS ACTION TO TRIAL.

1. THE STATUTORY TIME REQUIREMENT FOR BRINGING AN ACTION TO TRIAL WITHIN FIVE YEARS AND STATUTORY EXCLUSIONS FROM THAT TIME ARE DESCRIBED BELOW.

The California Code of Civil Procedure ("CCP") §583.310 requires that an action be brought to trial within five years after the action is commenced.

> "An action shall be brought to trial within five years after the action is commenced against the defendant." CCP §583.310

Statutory provisions exclude from the computation of that five year period among others, time when a stay of prosecution occurs.

> "In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

"(a) The jurisdiction of the court to try the action was suspended.

"(b) Prosecution or trial of the action was stayed or enjoined. (Emphasis added.)

"(c) Bringing the action to trial, for any reason, was impossible, impracticable, or futile."

CCP §583.340

That section was enacted by statutes 1984, effective January 1, 1985. The Law Commission Comment states, "Subdivision (a) of Section 583.340 continues the substance of the last portion of subdivision (f) of former Section 583. Subdivision (b) codifies existing case law."

Subsection (b) referring to a stay does not require an express stay ordered by the court. If the legislature had required an express stay, it easily could have said so. Therefore, an

implied-in-law stay of proceedings qualifies as an excluded period from the five-year period for bringing an action to trial.

2. PETITIONER'S COMPLYING WITH THE PROVISION OF BANKRUPTCY STATUTE 11 USC §327(e) RESULTED IN AN IMPLIED STAY OF PROSECUTION FOR 81 DAYS.

During the time its petition was pending in bankruptcy, petitioner complied with the federal requirements, among others, of delivering control of its assets to the trustee in bankruptcy. It also complied with bankruptcy statute 11 USC §327(e) by mailing to the bankruptcy trustee its application for employment of attorneys.

> "(e) The Trustee, with the [bankruptcy] court's approval, may employ, for a specified special purpose, other than to represent the Trustee in conducting the case, an attorney that has represented the debtor, if in the best interests of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed." 11 USC §327(e).

On July 8, 1982, petitioner's attorneys mailed their Application for Employment of Attorneys to the trustee in bankruptcy. That Application included a Declaration by one of the attorneys, Anson Whitfield, that none of those attorneys had any adverse interest to petitioner and could properly represent petitioner in the Ventura County Superior Court action. That Declaration was attached to the application; it was file stamped, "Received July 12, 1982," by the Trustee in bankruptcy. The next

stamp and date on the documents is on the face sheet of the application, stating, "Filed September 27, 1982. Clerk, U. S. Bankruptcy Court, Central District District of California, U. S. Bankruptcy Clerk." The last date on the cover sheet of that application shows it was, "Entered October 6, 1982, Clerk, U. S. Bankruptcy Court, Central District of California, U. S. Bankruptcy Clerk." During the time its Application was pending, petitioner had no control over its litigation, so that it was effectively stayed from taking any action in its Ventura County Superior Court action. Petitioner's creditors could not take any action against petitioner/debtor because of the automatic express stay of 11 USC 362(a), that stayed any action by any of them while petitioner's Application was in the

bankruptcy court.

The Declaration of Anson Whitfield, based on his first-hand knowledge of that Application declares it was never returned to Whitfield's office until after the order was entered on October 6, 1982. (Petitioner requested an extension of time, only to the date the order was signed on September 27, 1982, a period of 81 days. The extra time between September 27 and October 6, 1982, a period of 9 days, was not requested as part of the extended period (based on the implied-in-law period stayed period) because it may have been possible on September 27, 1982, for someone in the attorneys' office to have learned that the approval had been granted for their employment. The Declaration of Jill L. Jasper (App. E) submitted by respondent SECURITY

refers only to the usual procedure in the bankruptcy court's processing in about two weeks on application for employment of attorneys. She had no knowledge about how petitioner's attorneys' application proceeded in the bankruptcy court nor in the trustee's office.

There remained a clear 81 day hiatus between the attorneys' mailing their Application on July 8, 1982, and the Order approving their employment signed by Judge Ashland on September 27, 1982. The Court of Appeals clearly erred in making its egregious finding in its decision (App. B, pages B-4 and B-5):

> "Meanwhile, the request for approval to hire attorneys languished in the bankruptcy court. Hillview had failed to provide the court with the complete bankruptcy case number. Hillview finally supplied the bankruptcy court with the proper case number on September 27, 1982, 81 days

after making the application. On that date, the bankruptcy court approved the request."

There is no evidence that petitioner changed the number on its Application for employment of attorneys. The court's clear error was pointed out to the Court of Appeal by petitioner in its Request for Findings of Fact submitted to that Court of Appeal under California Rules of Court, Rule 23, (App. F). The court did not comment on that request (App. G).

An examination of the evidence regarding the number change and file stamps on the Application clearly indicates the egregious error of that Court of Appeal's misstatement of the evidence.

On the "Original" face sheet of the Application (App. C) only the number "82-" is handwritten and placed above the

typed "LA-07202-CA." Obviously, the "82-" indicated the year in which petitioner had filed its action. That "Original" was submitted in the trial court by respondent SECURITY with the affidavit of Jill L. Jasper (App. E).

On the "Copy" of that face sheet of that application (App. D) the entire correct number of "LA 82-07202 CA" is handwritten above the typed "LA-07202-CA." That was introduced in evidence by petitioner's attorney.

There was no evidence as to who handwrote the number of the action to include the "82-"; there was no evidence when the handwritten numbers were made. Particularly there was no evidence that petitioner or that its attorneys had any control of that Application after it was mailed July 8, 1982, until it was returned to those attorneys, presum-

ably after it was file stamped by the bankruptcy court, "Entered Oct 6 1982."

That there was negligence somewhere in either the trustee's offices or the bankruptcy court's office, or both is indicated by the difference in the handwritten case numbers of the "Original" and the "Copy," and the different places on each for the file stamped "Entered Oct 6 1982." That negligence, however, is not imputed to petitioner.

Res ipsa loquitur applies to show that if any delay occurred in processing petitioner's Application it was due to the negligence of the trustee in bankruptcy, to the bankruptcy court, or to both.

If any delay occurred in processing that Application (as the Declaration of Jill L. Jasper, App. B, suggests) it

was attributable due to the negligence of the trustee in bankruptcy, or to the bankruptcy court, or to both.

The requirements of res ipsa loquitur are set forth below.

> "The most important of the presumptions formerly termed 'inferences' is that of negligence, embodied in the doctrine of res ipsa loquitur ('the thing speaks for itself').
>
> "The supposed three conditions which make the doctrine applicable have been stated as follows: (1) The accident must be caused by an agency or instrumentality under the exclusive control of the defendant; (2) the accident must be of a type which ordinarily does not happen unless someone is negligent; (3) it must not have been due to any voluntary act or contributory fault of the plaintiff. When these three conditions are shown, a presumption arises that the accident arose from want of proper care..." (Citations omitted.) 1 Witkin California Evidence 3d., §230

In addition, by the automatic stay

provisions of 11 USC 362(a), respondents were prevented from taking any action against petitioner while its Chapter 11 petition in bankruptcy was in effect.

It is difficult to imagine an action where there was such an obvious stay of all proceedings. While petitioner was without the services of any attorney in its action below, there was no possibility of having anything done in the action by Hillview until Hillview could be represented by its attorneys.

In addition, there was no possibility that Hillview's attorneys could act while the application was pending, then apply for fees to the bankruptcy court by way of a nunc pro tunc order.

An application for a nunc pro tunc order was denied by the bankruptcy court in the matter of In Re Carl Johnson (1982) 21 Bankruptcy Rules,

Lawyers' Edition 217. The court stated,

at page 218:

> "The record before this Court clearly reflects that no order authorizing retention of counsel was ever signed until May 27, 1982, when attorneys for the debtor in possession then filed their application for retention pursuant to the requirements of Section 327 of the Code."
>
> "***11 U.S.C. §327 specifically mandates that employment of all professional persons be with 'court approval.' With reference to the filing in a Chapter 11 case, it is important to bear [that] in mind *** Ignorance of these important and crucial provisions is certainly not an excuse to the attorney, nor does it provide a sufficient legal basis for this Court to enter an order on a nunc pro tunc basis. Accordingly, where the attorney has not timely filed his application for rentention as counsel for the debtor in possession, denial of services prior to the entry of such order is entirely proper." In Re Carl Johnson (1982) 21 Bankruptcy Rules, Lawyers' Edition 217.

Finally, it is obviously unreasonable

to demand that petitioner have attempted to retain the services of attorneys without arranging for payment for their services.

3. STATUTORY AND CASE LAW AUTHORIZED THE COURTS TO GRANT PETITIONER'S MOTION FOR AN EXTENSION OF THE FIVE-YEAR PERIOD IN WHICH TO BRING ITS ACTION TO TRIAL.

The excluded time is added at the end of the five-year period no matter when during the five-year period the excluded time occurred.

> "Under Section 583.340 the time within which an action must be brought to trial is tolled for the period of the excuse, regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial." CCP §583.340 Law Revision Commission Comment, 1984 Addition, West's Annotated Codes.

It is the policy of the law to prefer trial of an action over its dismissal.

"It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as otherwise provided by statute or by rule of court adopted pursuant to statute, the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action in construing the provisions of this chapter." CCP §583.130

Also, petitioner should have been granted an extension of time because California's liberal interpretation of statutes giving preference for trial over dismissal for failure to meet statutory time requires statutory time

is exemplified in Davis v. Thayer (1980) 113 Cal.App.3d 892, 903; 170 Cal.Rptr. 328. There, the court considered defendants' motion for vacation of default and default judgment under CCP §473. Default was entered on November 3, 1978; an application was made to set aside the default on May 4, 1979, 182 days later, one day after six calendar months had ended on May 3, 1979.

Disregarding CCP §17(4) that stated a month "means a calendar month" (this included the six month limit of CCP §473,) the court used Government Code §6803 to define six months as the equivalant of half a year, therefore, 182 days. The court disregarded the trial court's ruling that dismissed the motion to vacate the default because the six calendar month period had expired on May 3, 1979, a period of 181

days. In doing so, the court stated:

> "Where a statute establishing a time limitation is susceptible of several possible interpretations a liberal rule of construction is applied, and the '...computation of time should be so made as to protect a right and prevent a forfeiture if this can be done without violating a clear intention or a positive statutory provision. As has been said, when the legislature requires a thing to be done within a certain time and deprives a party of a right for omitting to do it, the most liberal construction ought to be chosen and the furtherest time given from which the reckoning is to be made.' (34 Am.Jur., Limitation of Actions, §252, p. 207. Cited with approval in Wixted v. Fletcher, supra, 192 Cal.App.2d at p. 707, fn. 1.)" Davis v. Thayer (1980) 113 Cal.App.3d 892, 903; 170 Cal. Rptr. 328.

The court also ignored that its decision violated "a clear intention or a positive statutory provision." (CCP §17(4).) The court also disregarded the possibility of a forfeiture if a motion

for vacation of default occurred in a six calendar month period of 183 days (June through November) or 184 days (May through October). The court then denied defendant's motion to vacate the default on the premise that the petitioners there had, before bringing their motion, waited beyond a reasonable time.

Furthermore, petitioner should not be penalized in denying its motion for the 81 day extension because it used legal process, that of filing its Chapter 11 Debtor-In-Possession bankruptcy petition, to obtain an extension of time for the five-year period for bringing its action to trial.

In Kaye v. Mount La Jolla Homeowners Assn. (1988) 199 Cal.App.3d 111, 122,

the court held (in reversing the trial court):

> "Defendants also argue the time contraints faced by the Kayes were a product of their own making because they had twice arranged to have the hearing on the summary adjudication motion continued. The fact that the Kayes took advantage of legitimate procedures to seek short continuances -- one granted by the court and one stipulated to by the defendants -- cannot in our view be held against them." Kaye v. Mount La Jolla Homeowners Assn. (1988) 199 Cal.App.3d 111, 121

4. PETITIONER WAS NOT REQUIRED TO SHOW DUE DILIGENCE OF PROSECUTION FOR THE 81 DAY EXTENSION OF TIME

When CCP §583.340 was enacted, effective January 1, 1985, it replaced CCP §583 that previously contained provisions for the termination of actions for extensions of time because of excluded provisions. The provision

of CCP §583.340 excluding time when for the specifically stated times when a stay or injunction occurs had not been stated in CCP §583 and it has not been interpreted by the California Supreme Court to date. However, the lack of jurisdiction provision had been included in CCP §583 is now CCP §583.340(a). Therefore, by analogy to the rulings on that lack of jurisdiction provision, it can be shown that the stay provision does not require diligence in prosecution.

Construing that provision under CCP §583(f), the court held that the time for bringing an action to trial was suspended upon the death of the defendant and because no personal representative had been appointed the court had no jurisdiction of the action." The court held:

> "Lack of jurisdiction, however, is an express statutory exception to the five-year bar, separate and distinct from exceptions based upon impossibility or impracticability. Where lack of jurisdiction is asserted, plaintiff's diligence, or lack thereof, has no place in the analysis. '[S]ection 583, subdivision (f), does not supply a time limit; nor does it impose upon plaintiff a duty to expedite matters..." Op.cit. 616. Herring v. Peterson (1981) 116 Cal.App.3d 608, 613; 172 Cal.Rptr. 240.

By analogy, the specific provision of an implied-in-law stay does not require that diligence in prosecution be shown. That is contrary to the California Court of Appeal's decision (App.B-19), where that court clearly erred in stating:

> "The critical factor, however, is whether the plaintiff demonstrates it exercised reasonable diligence, such as ongoing and thorough participation in discovery."

It is the catch-all provision of CCP

§583.340(c) that requires due diligence of prosecution. That section was so interpreted by the California Supreme Court in Salas v. Sears, Roebuck & Co. (1986) 42 Cal.3d 342, 228 Cal. Rptr. 504, when it granted petition for review "because of a conflict of decision," op. cit. 343.

D. THE CONSTITUTIONAL VIOLATION OF THE DECISION OF THE COURT OF APPEAL WAS RAISED BY PETITIONER AT THE EARLIEST OPPORTUNITY.

The trial court did not make a statement of decision after denying petitioner's motions for extension of time and for special trial setting.

The proposed decision of the Court of Appeal was clearly erroneous in misstating the facts as set forth above. Petitioner then moved for a rehearing, and requested findings of fact by that Court of Appeal. Appendix F herein is

a reprinted copy of that request for findings of fact submitted to that court as permitted by California Rules of Court, Rule 23. Appendix G is the reprinted copy of the denial for rehearing without reference to petitioner's request for findings of fact.

That egregious error of the Court of Appeal denied petitioner due process of law, is State action proscribed by both the Fourteenth Amendment of the Constitution of the United States and the California Constitution, Article 1, §7. Both require that no person shall be deprived of his property (here, petitioner's day in court) without due process of the law. Due process requires a fair hearing. It is not a fair hearing where the court substitutes its conjecture for evidence. Thus the State denied petitioner due process of

law. Ex parte Virginia (1880) 100 U.S. 339, 25 L.Ed. 676.

Generally, a constitutional question must be raised at the earliest opportunity or it will considered waived. Despite that rule, the courts have permitted Constitutional questions to be raised on appeal for the first time where the "asserted error fundamentally affects the validity of the judgment."

> "We have held that a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts. Moreover, although California authorities on the point are not uniform, our courts have several times examined constitutional issues raised for the first time on appeal, especially when the enforcement of the penal statute is involved, the asserted error fundamentally affects the validity of the judgment, or important issues of public policy are at issue." (Citations omitted). Hale v. Morgan (1978) 22 Cal.3d 388, 394; 149 Cal. Rptr. 375, 584 P2d 512.

Obviously, the Court of Appeal's misstatement of the evidence fundamentally affected the validity of its judgment that denied petitioner the implied-in-law stay effect of petitioner's compliance with 11 USC §327(e), as shown above.

E. CALIFORNIA COURTS ARE UNCERTAIN AND CONFUSING IN THEIR DECISIONS FOR THE REQUIREMENTS OF A STAY OF PROSECUTION TO ENTITLE AN APPLICANT FOR EXTENSION OF TIME TO BRING ITS ACTION FOR TRIAL.

The confusion of this Court of Appeal is manifest from its decision in demanding that petitioner show due diligence of prosecution. That requirement is applicable only for the exclusion of time where the applicant relies on the impossible, impracticable, or futility provision of CCP §583.340(c), as discussed above.

A more clear example of uncertainty and confusion is shown by Court of

Appeal in the recent case of Byerly v. Sale (September 1988) 204 Cal.App.3d, 1312, __Cal. Rptr.___. There, the Court of Appeal clearly indicated the confusion between a stay and the impossible, impracticable and futile provisions for extension of time. In comingling both provisions, the court held that because arbitration had been ordered, that the aribitration order stayed the action. The court stated:

> "As plaintiffs argue, Code of Civil Procedure section 583.340, subdivision (c) excluded from the five years the entire period during which an action is stayed or where '[b]ringing the action to trial, for any other reason, was impossible, impracticable, or futile.' The lawsuit was stayed five months after it was filed, and the stay was continuously in effect until the trial court purported to dismiss the action under the mandatory five-year statute. During that entire time, it was indisputably impossible for plaintiffs to bring their

> action on the complaint to trial. Thus, dismissal of the complaint was improper." (Emphasis added.) Op.cit.1314

Obviously, the action was stayed so that CCP §583.340(b) was the proper section as a basis for the extension of time beyond the five-year period. CCP §583.340(c) as a basis for court's granting an extension of time for the stayed period of time is inapplicable.

REASONS FOR GRANTING THE WRIT

I

THE INTERPRETATION OF A FEDERAL BANKRUPTCY STATUTE 11 USC §327(e) IS REQUIRED TO DETERMINE WHETHER COMPLIANCE WITH ITS PROVISION EFFECTS A STAY OF PROSECUTION OF AN ACTION IN A STATE COURT ACTION

As noted herein there is no federal or California case to determine whether or not a petitioner in bankruptcy who complies with 11 USC §327(e), and petitions the bankruptcy court for authority to employ attorneys to prosecute its

state action is entitled to an implied-in-law stay of prosecution while that application is being processed for approval by the bankruptcy court. Petitioner asserted that its compliance with 11 USC §327(e) resulted in an implied-in-law stay of 81 days; that was the time between the date its attorneys mailed that application to the bankruptcy court and the time the bankruptcy court approved it. Petitioner also asserted that that implied-in-law stay of 81 days pursuant to California statutes extended for 81 days the statutory five-year period in which petitioner was otherwise required to have brought its action to trial. Clarification of that federal statute as an implied-in-law stay of prosecution would aid in settling the California law, and the law of other states with similar statutory

requirements.

II

THE REVIEW OF PETITIONER'S MOTIONS BY THIS COURT WOULD CORRECT THE EGREGIOUS ERROR OF THE COURT IN MISSTATING THE EVIDENCE, THUS VIOLATED PETITIONER'S DUE PROCESS RIGHTS, THAT RESULTED IN A MISCARRIAGE OF JUSTICE.

As argued above, the Court of Appeal decision is clearly erroneous in its egregious error in misstating the evidence in holding that petitioner was responsible for the undue time its application for employment of attorneys was being processed in the bankruptcy court. Because there was a specific State statutory provision excluding from that five-year period the time when there was a stay of prosecution, petitioner was entitled to an extension of that five-year period by the 81-day period referred to above. The decision

violated petitioner's right of due process under the federal and State Constitutions resultng in a miscarriage of justice by denying petitioner its day in court.

III

BY ITS REVIEW OF PETITIONER'S MOTION FOR EXTENSION OF TIME IN WHICH TO BRING ITS ACTION TO TRIAL, THIS COURT WILL ENHANCE THE ORDERLY ADMINISTRATION OF JUSTICE IN CALIFORNIA.

The specific statutory provision for exclusion of time based on a lack of during the time when the court lacked jurisdiction had been interpreted for many years. The specific provision for excluding time when an action is stayed was not clearly set forth until the enactment of CCP §583.340(b) effective January 1, 1985. The courts of California are in confusion in interpreting that statute particularly because of the

exclusion from the required periods for bringing an action to trial because of the catch-all impossible, impracticable, or futile exclusions of CCP §583.340(c). This court's ruling on the effect of that statute will remove the uncertainty and confusion in the State courts and will enhance the orderly administration of justice in California with regard to the interpretation to the stay of prosecution referred to in that statute.

CONCLUSION

Petitioner's compliance with bankrutpcy statute 11 USC 327(e) between the time that Application was mailed to the bankruptcy court by those attorneys on July 8, 1982, until it was approved by the bankruptcy judge on September 27, 1982, a period of 81 days. State statutes authorized an exclusion

of the stayed period of time of 81 days from the five-year period for bringing an action to trial.

The Court of Appeal's decision egregiously misstated the evidence in finding that petitioner had delayed the progress of its Application submitted by it to the bankruptcy court in compliance with federal statute 11 USC §327(e). That egregious error violated petitioner's right of due process. evaluation of the evidence. That denial of due process violated the federal and California Constitution provisions prescribing a state from depriving any person of his property (in this instance petitioner its day in court) without due process of law.

The Court of Appeal's decision also misstated the law by requiring petitioner to show due diligence of prosecution to

obtain extension of time based on a stay of prosecution of its action in the trial court. To the contrary, due diligence of prosecution is not required where the specific provision of the statute for a stay of prosecution is shown. Therefore, those rulings in the decision of the Court of Appeals were clearly erroneous.

Granting this petition for a writ of certiorari will resolve the interpretation of a federal bankruptcy statute, 11 USC 327(e), in its effect in a stay of prosecution while the required Application for Employment of Attorneys is being processed in the bankruptcy court, will correct the miscarriage of justice by which petitioner was denied its day in court by Court of Appeal's decision that clearly mistated the evidence regarding the processing of petitioner's

Application in the bankruptcy court, and will, by clarifying California statutory exclusion of a stayed period from the time required for bringing an action to trial, enhance the orderly administration of justice in California.

DATED: March 20, 1989

Respectfully submitted,

C. RUSSELL KING
Attorney at Law

APPENDIX A

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 6, No. B026632
S007905

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
F I L E D

HILLVIEW ESTATES, LTD.

DEC 21 1988

v. Clerk

MO-CON VENTURES, INC. et al. Deputy

Appellant's petition for review DENIED.

/s/ Lucas

Chief Justice

APPENDIX B

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

HILLVIEW ESTATES, LTD., a limited partnership,	2d Civil No. B026632
Plaintiff and Appellant,	Super. Ct. No. 75606) Ventura
v.	County)
MO-CON VENTURES, INC., GAP DEVELOPMENTS, INC., TWO C MOBILEHOME SALES, INC., SECURITY PACIFIC NATIONAL BANK, et al.,	COURT OF APPEAL-SECOND DIST. FILED OCT. 5-1988
Defendants and Respondents	ROBERT N. WILSON CLERK
AND RELATED CROSS ACTIONS.	Deputy Clerk

Hillview Estates, Ltd. (Hillview) appeals the order of dismissal granted respondent, Security Pacific National Bank (Security), on the grounds of failure to commence prosecution of this case

within the mandatory five-year statutory limitation period. (Code Civ. Proc., §§ 583.310 et. seq.) Hillview urges that a protective order, precluding further discovery until it supplied answers to interrogatories, and an application then pending for authority to employ counsel in a bankruptcy proceeding, tolled the five year period for eighty days. It contends the court abused its discretion in refusing to consider that eighty day period as a stay tolling the operation of the five year statute. We disagree and affirm the order of dismissal. Hillview failed to sustain its burden to prove its action was stayed. Moreover, Hillview has not shown it was not possible or practicable to commence trial within five years of filing the complaint.

FACTS

Hillview, in debt, filed the complaint on January 7, 1982, to block foreclosure proceedings. On April 8, 1982, various defendants propounded interrogatories to Hillview in that suit.

On May 3, 1982, Hillview, a limited partnership, filed a reorganization petition in the bankruptcy court as a debtor-in-possession. As a debtor-in-possession filing the petition, Hillview was not entitled to an automatic stay of the instant action. (See Association of St. Croix Condominium Owners v. St. Criox Hotel (3rd Cir. 1982) 682 F.2d 446, 448; also see Boone v. Beacon Bldg. Corp. (N.J. 1985) 613 F.Supp. 1151, 1155; and cf. 11 U.S.C. §362 (a) which only accords automatic stays in proceedings brought against the debtor.) On July 8, 1982, Hillview applied for authority to employ

attorneys in the bankruptcy court pursuant to 11 United States Code section 327 (e). Section 327 (e) reads, in pertinent part, "[t]he trustee, with the court's approval, may employ . . . an attorney . . . . "

As of July 8, 1982, Hillview had not answered the interrogatories or, in the alternative, to obtain a protective order precluding further discovery by Hillview until it answered. The superior court granted a protective order on July 9, 1982, stating that neither party could engage in discovery proceeding until the bankruptcy court approved the order appointing counsel and that Hillview could not engage in discovery until it answered the interrogatories.

Meanwhile, the request for approval

to hire attorneys languished in the bankruptcy court. Hillview had failed to provide the court with the complete bankruptcy case number. Hillview finally supplied the bankruptcy court with the proper case number on September 27, 1982, 81 days after making the application. On that date, the bankruptcy court approved the request. Several months later, on Hillview's motion, the bankruptcy court dismissed the petition for reorganization.

About three years later, on December 4, 1985, Hillview moved the superior court to vacate the protective order of July 9, 1982. Hillview had still not answered the interrogatories propounded April 8, 1982. The court ordered Hillview first to answer those interrogatories within 90 days. It stated that Hillview could not engage in further discovery until it complied with the order. The order also

prevented defendants from engaging in discovery directed at Hillview for 90 days from the date of the order, December 26, 1985. Hillview did not answer the interrogatories until July 10, 1986, more than four years after they were propounded.

The five year period was to expire January 7, 1987. On December 17, 1986, without ever filing an at-issue memorandum, Hillview noticed a motion for January 6, 1987, the day before the five year period ended, to specially set trial for August 12, 1987. After realizing its basis for extending the five year period might not be valid, Hillview obtained an order shortening time and provided an amended motion requesting, inter alia, an immediate special trial date of January 2, 1987, the date it sought to have the motion heard. A declaration attached to that motion, filed December 30, stated

that Hillview still desired to conduct further discovery of several defendants.

After it obtained a continuance of the hearing on its motion, Hillview filed a second amended motion, on January 16, 1987, for extension of the five year limit. Defendants moved for dismissal. On February 13, 1987, the court heard the motions, denied extension and granted dismissal. On March 4, 1987, the court filed its order dismissing Hillview's complaint for failure to prosecute it within the mandatory statutory five year limitation. Hillview's subsequent motions for reconsideration, extension, special trial setting and statement of decision were also heard and denied. This appeal followed.

DISCUSSION

Code of Civil Procedure section 583.310 states that, "[a]n action shall

be brought to trial within five years after the action was commenced against the defendant."1 /

Section 583.360 mandates dismissal if the plaintiff does not comply with section 583.310. It states, in pertinent part, "(a)An action shall be dismissed by the court. . .on motion of the defendant. . .if the action is not brought to trial within the time prescribed in this article."

Hillview failed to commence trial within five years from the date it commenced this action. However, Hillview maintains this five year period was tolled by a stay of at least an additional 43 days to enable the court to process its application to hire counsel in the bankruptcy proceeding, and to comply with the protective order, issued by the superior court, precluding further

discovery until counsel could be hired.

2/ Hillview relies on section 583.340 which reads, in pertinent part: "In computing the time within which an action must brought to trial pursuant to this article, there shall be excluded the time during which any of the

---

1/ All further references to section numbers refer to the Code of Civil Procedure, unless otherwise stated.

2/ The continuances Hillview obtained on its motions to specially set would reduce the 80 day period to the 43 day figure.

following conditions existed; [¶] (a) . . . . . [¶] (b) Prosecution or trial of the action was stayed or enjoined. [¶] (c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile."

Hillview purports not to rely on subsection (c), but it cites and argues the applicability of cases relying on this subsection to support its position; e.g. see Tejada v. Blas (1987) 196 Cal.App.3d 1335; Kaye v. Mount La Jolla Homeowners Assn. (1988) 199 Cal.App.3d 111, infra.

We find that neither the application process nor the protective order constitutes a stay of prosecution. We also find the court did not abuse its discretion in determining Hillview had no other excuse precluding it from commencing trial within five years from the date it filed this suit.

Section 583.360(b) states, "[t]he requirement of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute."

Despite this the Legislature has stated its general preference for trial or other disposition on the merits over dismissal for failure to proceed with reasonable diligence. Section 583.130 provides, in pertinent part; "It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as otherwise provided by statute or by rule of court adopted pursuant to statute, . . . the policy favoring trial or other disposition of an action on the merits [is] generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action in construing the provisions of this chapter."

Hillview asserts the protective order is either an express or implied stay of prosecution tolling the five year statute. It relies on Barber v. Lewis and Kaufman, Inc. (1954) 125 Cal.App.2d 95, Rosenthal v. Wilner (1988) 197 Cal.App. 3d 1327; and Nail v. Osterholm (1970) 13 Cal.App.3d 682. They are irapposite.

Barber concerned a dismissal of a minority shareholders' derivative suit for their failure to timely post security required by statute. The appellants in Barber insisted that quashing the issuance and service of a request for deposition was a erroneous deprivation of their right to prosecute the suit.

Although taking a deposition is part of the prosecution of an action, the court found no error in the order to quash. The court found that Corporation Code section 834 provided that the prosecution of an

action shall be stayed until ten days after a motion for posting security has been resolved. The court stated that the corporation should not have to undergo costly depositions while the 834 motion was pending. (Barber v. Lewis and Kaufman Inc., supra, 125 Cal.App.2d at p.98.)

Unlike Barber, Hillview spent much of the five year period avoiding discovery. Moreover, Barber involved a specific statutory stay of prosecution, whereas here there is none. Hillview erroneously assumes the protective order made here was a stay.

The mere fact that interrogatories are part of the prosecution of a case does not mean that a protective order, obtained by defendants due to Hillview's intransigence in answering them, necessarily constitutes a stay of the action under Barber.

Rosenthal v. Wilner (1988) 197 Cal.App.3d 1327 is also inapposite. Rosenthal concerned the applicability of section 583.350, which permits a six month extension to bring a case to trial when the end of a tolling period leaves less than six months to commence trial. (Id., at pp. 1329, 1332.)

In Rosenthal, the appellate court had issued a stay order, pending the resolution of a separate underlying appeal, because it might affect the case before it. (Id., at p. 1331.) The specific issue in Rosenthal was the date when the stay order terminated for purposes of the operation of section 583.350. (Id., at pp.1332-1333.) Unlike Rosenthal, no express judicial stay has been issued in this case; only a protective order.

In the alternative, Hillview argues the protective order is an implied stay

of prosecution. Hillview relies on Nail v. Osterholm (1970) 13 Cal.App.3d 682 to support its position. Nail does not assist appellant.

In Nail, the trial judge informed the parties on the day trial had been scheduled that he knew one of the defendants. The appellate court held that delay of the commencement of trial, due to the filing of a 170.6 affidavit, could not be attributed to the plaintiff, and absent the potential bias problem raised by the trial judge, the plaintiff had shown no neglect which would justify dismissal of the action. (Id., at p. 685.)

The court found that plaintiff satisfied the burden of showing impracticability within the meaning of 583.340 (c) and held that dismissal under such circumstances would be a miscarriage of

justice. (Id., at pp. 686-687.) Nail was not an ordinary case of common delays in discovery, as here; it was an extraordinary case of potential bias exposed on the day of trial. (Id., at p. 687.)

Still, Hillview argues it is entitled to an extension of time, citing cases discussing section 583.340(c), which involve claims of impossibility, impracticability or futility in timely commencing trial. The court below disagreed, and we find no error in its position.

As the court stated in Griffis v. S.S. Kresge Co. (1984) 150 Cal.App.3d 491, 498: "The question of whether the plaintiff had reasonable opportunity to bring a case to trial within the time prescribed by law is a factual one and lies within the sound discretion of the

trial court; the determination thereof will not be disturbed on appeal unless it appears to exceed the bounds of reason. [Citations.]"

This determination is made on a case-by-case basis, considering all the circumstances of the particular case. (Moran v. Superior Court (1983) 35 Cal.3d 229, 238; Tejada v. Blas (1987) 196 Cal.App.3d 1335, 1339-1340.) The plaintiff has the burden to show by clear and convincing evidence it has exercised reasonable diligence and is otherwise entitled to proceed. (Central Mutual Ins. Co. v. Executive Motor Home Sales, Inc. (1983) 143 Cal. App.3d 791, 796; but see Bank of America v. Superior Court (1988) 200 Cal.App.3d 1000, 1013-1014, fn. 8, questioning this standard of proof in lieu of a preponderance standard.)

Bank of America involved, inter alia,

the question of whether a stay of depositions, granted until a given date unless certain conditions regarding a coordination petition were met, tolled the five year statute. Citing the rule that time consumed by ordinary pretrial delays in discovery do not excuse failure to bring a case to trial (see Crown Coach Corp. v. Superior Court (1972) 8 Cal. 3d 540, 548), the court rejected plaintiff's arguments to extend time. (Bank of America v. Superior Court, supra, 200 Cal.App.3d at p. 1016.)

In Bank of America, petitioners argued that delay caused by a real party's inability to file a nondefective complaint for a period of time, caused by a dispute between counsel for the real party and counsel for a bankruptcy trustee, supplied the basis for an extension of the five year statute. The court disagreed.

The court found, as here, no stay was issued which would have affected plaintiff's ability to proceed to trial in a timely fashion.

Courts consider all of the circumstances of the particular case, including the conduct and acts of the parties and the nature of the proceeding, to accomplish the purpose of the statute - the prevention of delay in commencing trial. (Moran v. Superior Court, supra, 35 Cal. 3d at p. 238.) The critical factor, however, is whether the plaintiff demonstrates it exercised reasonable diligence, such as ongoing and thorough participation in discovery. (Id., at pp. 238-240.)

In this case Hillview conducted minimal discovery and resisted defendants' reasonable requests to answer its' interrogatories for over four years. Hillview's lastminute attempts to set this

matter for trial, without filing an at-issue memorandum, further shows it did not prosecute this case diligently. The case had not been taken off calendar or removed from the civil active list. The court below did not abuse its discretion in determining that Hillview had not met its burden to show due diligence in prosecuting this action.

ESTOPPEL

Hillview argues that even if no stay existed, the defendants are estopped to assert Hillview is not entitled to additional time to commence trial since defendants are the ones who sought the protective order.

Although the doctrine of equitable estoppel is generally available to plaintiffs in a five year dismissal case, Hillview is not in a position to argue equity here. Tejada v. Blas, supra, 196 Cal.App.

3d at p. 1341.) The defendants did not lull Hillview into a false sense of security resulting in their inaction. Equity supports the defendants in this case.

Hillview forced the defendants to seek the protective order because it refused to answer interrogatories properly presented to it. The defendants had to move for an order compelling Hillview to answer, or, in the alternative, to obtain the protective order the court granted. In this way defendants sought to prod Hillview into completing discovery.

Even if, arguendo, defendants had been uncooperative, which does not appear to be the case here, it would not excuse Hillview's intransigence and its dilatory tactics. (Tejada v. Blas, supra, 196 Cal. App.3d at p. 1340.) Hillview did not

answer these interrogatories for more than four years. Then they waited until the last minute to make a belated, deficient attempt to set this matter for trial for dates beyond the running of the five year statute.

The judgment is affirmed. Costs are awarded to respondents.

NOT TO BE PUBLISHED.

ABBE, J.

We concur:

STONE, P.J.

GILBERT, J.

Marvin H. Lewis, Judge

Superior Court County of Ventura

C. Russell King, for Plaintiff and Appellant

Barton, Klugman & Oetting and Robert Louis Fisher, for Defendants and Respondents Security Pacific National Bank, Robert D. Patterson and Equitable Deed Company.

No appearance for Respondents Mo-Con Ventures, Inc., Gap Developments and Charles A.Gilliard.

No appearance for Respondents Two C Mobilehome Sales, Inc. and Carroll D. Courtnier.

No appearance for Respondent Edward A. Skifstrom.

No appearance for Respondents Robert Placencia and Joseph R. Alsip.

APPENDIX C

ORIGINAL

COHEN, ENGLAND, WHITFIELD & OSBORNE
Fifth Floor, Financial Plaza Tower
500 Esplanade Drive
Oxnard, California 93030
Telephone: (805)485-9627
Attorneys for Debtor

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED

SEP 27 1982

CLERK, U.S.
BANKRUPTCY COURT,
CENTRAL DISTRICT
OF CALIFORNIA
BY BANKRUPTCY CLERK

ENTERED

OCT 6 1982

CLERK, U.S.
BANKRUPTCY COURT,
CENTRAL DISTRICT
OF CALIFORNIA
BANKRUPTCY CLERK

LODGED

1982 Sep 27 PM 1:09

CLERK, U.S. BKCY. COURT
CENT.DIST. OF CALIF
BY DEPUTY

In Re
HILLVIEW ESTATES, LTD.,
a limited partnership, Debtor.

Case No. LA-07202-CA
(Chapter 11)

APPLICATION OF DEBTOR IN POSSESSION FOR AUTHORITY TO EMPLOY ATTORNEYS, AND ORDER THEREON

This application of Hillview Estates, Ltd., a limited partnership, the Debtor in Possession in the above-encaptioned Chapter 11 proceeding, alleges as follows:

1. This Chapter 11 proceeding was initiated on May 3, 1982, with the filing by the Debtor of its voluntary petition for an arrangement under Chapter 11 of the Bankruptcy Code.

2. The Debtor is a Debtor in Possession subject to the supervision of the United States Trustee for the Central District of California.

3. Prior to or about the commencement of this Chapter 11 proceeding, Hillview Estates, Ltd., had initiated as plaintiff the following actions in the Superior Court for the State of California, County of Ventura, with the law firm of Cohen, England,

ORIGINAL

APPENDIX D

COPY

COHEN, ENGLAND, WHITFIELD & OSBORNE
Fifth Floor, Financial Plaza Tower
500 Esplanade Drive
Oxnard, California 93030
Telephone: (805)485-9627
Attorneys for Debtor

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED

SEP 27 1982

CLERK, U.S.
BANKRUPTCY COURT,
CENTRAL DISTRICT
OF CALIFORNIA
BY BANKRUPTCY CLERK

ENTERED

OCT 6 1982

CLERK, U.S.
BANKRUPTCY COURT,
CENTRAL DISTRICT
OF CALIFORNIA
BANKRUPTCY CLERK

LODGED

1982 Sep 27 PM 1:09

CLERK, U.S. BKCY. COURT
CENT.DIST. OF CALIF
BY DEPUTY

HILLVIEW ESTATES, LTD.,
a limited partnership, Debtor.

Case No. LA 82-07202 CA ~~LA-07202-CA~~
(Chapter 11)

APPLICATION OF DEBTOR IN POSSESSION FOR AUTHORITY TO EMPLOY ATTORNEYS, AND ORDER THEREON

This application of Hillview Estates, Ltd., a limited partnership, the Debtor in Possession in the above-encaptioned Chapter 11 proceeding, alleges as follows:

1. This Chapter 11 proceeding was initiated on May 3, 1982, with the filing by the Debtor of its voluntary petition for an arrangement under Chapter 11 of the Bankruptcy Code.

2. The Debtor is a Debtor in Possession subject to the supervision of the United States Trustee for the Central District of California.

3. Prior to or about the commencement of this Chapter 11 proceeding, Hillview Estates, Ltd., had initiated as plaintiff the following actions in the Superior Court for the State of California, County of Ventura, with the law firm of Cohen, England,

ORIGINAL

APPENDIX E

DECLARATION OF JILL L. JASPER

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

I, JILL L. JASPER, declare:

1. I am an attorney duly licensed to practice law before all Courts of the State of California and I am associated with the law firm of Barton, Klugman & Oetting, attorneys of record for defendant and cross-complainant SECURITY PACIFIC NATIONAL BANK and defendants ROBERT D. PATTERSON and EQUITABLE DEED COMPANY. I make this declaration of my own personal knowledge, and if called as a witness could and would competently testify thereto.

2. I reviewed the Bankruptcy Court's file in LA 82-07202-CA, the Chapter 11 bankruptcy petition filed HILLVIEW ESTATES (hereinafter referred to as "Plaintiff" or "HILLVIEW") filed on May

3, 1982.

3. Attached to this Declaration marked Exhibit "A" is a certified copy of the Notice of Requirements of the United States Trustee of Debtor-in-Possession in Chapter 11 case together with the facing page of the original Chapter 11 petition, which is marked Exhibit "A".

4. Attached to this Declaration marked Exhibit "B" is a certified copy of Supplemental Notice No. 1 of Requirements of the United States Trustee in Chapter 11 Matter in Re Hillview Estates, Ltd.

5. I reviewed both the Notice of Requirements and the Supplemental Notice of Requirements and I find nothing in either the Notice or the Supplemental Notice which prohibits plaintiff from employing attorneys without prior written approval from the United States Trustee

or the Bankruptcy Court. Paragraph 9 of the Notice of Requirements found at page 5 states that the debtor may not compensate attorneys without authority and explains the rule for presenting applications to the United States Trustee. Those rules do not require a hearing on noticed motion before the application may be acted on by the United States Trustee.

6. Attached to this Declaration marked Exhibit "C" is a certified copy of the Application of the Debtor-In-Possession for Authority to Employ Attorneys and Order Thereon. The Application bears the following legend stamped on its face: "ORIGINAL FILED SEPT. 27, 1982 CLERK, U.S. BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA" and said Application shows on its face that the Application was granted pursuant to Order dated September 27, 1982 and signed by Calvin K. Ashland,

Bankruptcy Judge. Said Application was undated.

7. Attached to this Declaration marked Exhibit "D" is a certified copy of the Notice of Motion for Order of Dismissal of Bankruptcy Proceeding bearing a filing stamp showing "FILED NOVEMBER 29, 1982," and a certified copy of a Motion for Order of Dismissal of Bankruptcy Petition marked Exhibit "E", and a certified copy of Memorandum of Points and Authorities in Support of Motion for Order of Dismissal of Bankruptcy Petition marked Exhibit "F".

8. Attached to this Declaration marked Exhibit "G" is a certified copy of an Order of of Dismissal of Bankruptcy Proceedings dated December 13, 1982 and filed December 13, 1982. My review of the file in the Bankruptcy Court also revealed a copy of a letter

from attorneys for the debtor dated December 17, 1982 transmitting an original and nine copies of Notice of Order of Dismissal and another copy of the same Order of Dismissal showing that it was filed December 20, 1982.

9. My review of HILLVIEW's aforementioned bankruptcy file did not disclose any court-ordered limitation on the debtor-in-possession's power to employ attorneys.

10. On January 13, 1987 I telephoned Kristine E. Hoffman, the former staff attorney of the Office of the U.S. Trustee, located at Los Angeles, California, who had primary responsibility for the HIILLVIEW bankruptcy petition at said office and who is currently in private practice at the law firm of Arak, Welter, Snipper and Green in Los Angeles, California.

11. Ms. Hoffman informed me that the nearly three months delay between the time HILLVIEW's Application to employ attorneys was received in the U.S. Trustee's office and the time said Application was granted by the Bankruptcy Court was caused, at least in part, by HILLVIEW's failure to abide by the local rules then in effect with respect to such Application, and the Application's rejection and return to HILLVIEW's attorney as a result.

12. Ms. Hoffman informed me that under normal conditions, an application of the type referenced above in Paragraph 2 that was hand-carried to the U.S. Trustee for approval and then to the Bankruptcy Court would be granted on the same day it was presented; but that if mailed, it could take up to two weeks to be processed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 20th day of January, 1987 at Los Angeles, California.

/s/ Jill L. Jasper

JILL L. JASPER

APPENDIX F

REQUEST FOR FINDINGS OF FACT

I. PURPOSE

HILLVIEW requests that the court make the following findings of fact. These are for the purpose of demonstrating that HILLVIEW's Application for Employment of Attorneys made to the U.S. Bankruptcy Court was a stay of proceedings implied in law thereby entitling HILLVIEW for an extension of 81 days of the five year period to bring its action to trial. HILLVIEW had no control over its action in the trial court while that Application was pending before the trustee in bankruptcy and the bankruptcy judge for the period July 8, 1982, when HILLVIEW mailed that Application, until that Application was approved by order of the bankruptcy court, the Honorable CALVIN K. ASHLAND, on September 27, 1982.

HILLVIEW submits that that period during which it had no control of its action against defendants had the same effect as an order to stay its action against them; therefore, that period of time qualified as a stay of proceedings under CCP §583.340(b) to enable HILLVIEW to have the five year period for trial extended by that period of 81 days.

These findings of fact are also requested because the court's decision filed October 5, 1988, herein is manifestly erroneous in stating at pages 2 and 3:

> "Meanwhile, the request for approval to hire attorneys languished in the bankruptcy court. Hillview had failed to provide the court with the complete bankruptcy case number. Hillview finally supplied the bankruptcy court with the proper case number on September 27, 1982, 81 days after making the application. On that

date, the bankruptcy court approved the request."

To the contrary, there is no evidence to support the statements that HILLVIEW failed to provide the court with the complete bankruptcy case number, or that it, at any time, supplied the correct number.

II. FINDING OF FACT

1. May 3, 1982

HILLVIEW filed its Chapter 11, debtor-in-possession U.S. Bankruptcy Court, Central District of California, case #LA-07202-CA. (Decision, p.2)

2. May 17, 1982

Trustee in bankruptcy mailed HILLVIEW a "Notice of Requirements of United States Trustee of Debtor-In-Possession in Chapter 11 Case." [CT:I,231-241]

3. July 8, 1982

HILLVIEW, through its attorneys

COHEN, ENGLAND & WHITFIELD, filed their application for employment of attorneys with the trustee in bankruptcy as shown by affidavit of mailing that petition. [CT:2,452]

4. July 12, 1982

Attorney ANSON WHITFIELD's affidavit states that the application when returned to him showed the trustee received the application on July 12, 1982. [CT:2,446]

5. September 27, 1982

That petition by its file stamp shows that the bankruptcy court filed that petition on September 27, 1982. [CT:2,448]

6. September 27, 1982

The signature of the bankruptcy judge approving that employment of attorneys against defendants shows a date of September 27, 1982. [CT:2,451]

7. October 6, 1982

Page 1 of the Application shows a file stamp of October 6, 1982, as the date on which it was "Entered." [CT:2,448].

8. There is a period of 81 days between July 8, 1982, and September 27, 1982.

9. The case number is that shown on the face sheet, and Exhibit A attached hereto and by reference made a part hereof shows a typed number, "LA-07202-CA". [CT:2,448]

10. That face shows that a line is drawn through that typed number, and shows a handwritten number as "LA 82-07202 CA". [CT:2,448]

11. There is no evidence to show who changed the typewritten case number to the handwritten one.

12. There is no evidence to show when the change was made in the typewritten case number to the handwritten one occurred.

13. There is no evidence to indicate what accounted for the time between the date of mailing that application, July 8, 1982, and the approval on September 27, 1982, for the employment of attorneys for HILLVIEW.

14. There is nothing on the Application to show that it was returned to Hillview's attorneys for any reason.

15. There is nothing on that Application to show that it was filed more than one time in the Bankruptcy Court's office other than the stamped dates of "Filed Sept 27 1982" and "Entered Oct 6 1982". [CT:2,448]

16. The affidavit of ANSON WHITFIELD affirms nothing except the usual mailing and procedures occurred in processing that Application. [CT:2,445-447]

DATED: October 20, 1988

Respectfully submitted,

C. RUSSELL KING

APPENDIX G

OFFICE OF THE CLEARK

COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

ROBERT N. WILSON, CLERK

DIVISION: 6 DATE: 11/01/88

C. Russell King

126 North 8th Street

P.o. Box 888

Santa Paula, CA 93060

RE: Hillview Estates

VS.

Mo-Con Ventrues, Inc., Etal

And Related Cross Actions

2 Civil B026632

Ventura No. 75606

THE COURT:

PETITION FOR REHEARING DENIED

Supreme Court, U.S.
FILED
APR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1557

In The

Supreme Court of the United States

October Term, 1988

HILLVIEW ESTATES, LTD.,

Petitioner,

vs.

MO-CON VENTURES, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second District, Sixth Division

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Robert Louis Fisher
Barton, Klugman & Oetting
333 South Grand Avenue, 37th Floor
Los Angeles, California 90071-1599
(213) 621-4000

Attorneys for Respondents Security Pacific National Bank, Robert D. Patterson and Equitable Deed Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

The only question presented for review by the Petition for Writ of Certiorari should properly be phrased as follows:

1. Did the California Court properly apply California Code of Civil Procedure Section 583.360 in dismissing Petitioner's Superior Court Complaint because Petitioner failed to carry its burden of proving its diligence in all stages of the proceeding where Petitioner made its first motion for trial setting five years and 37 days after Petitioner filed the Complaint?

LIST OF PARTIES

The parties to this proceeding are: HILLVIEW ESTATES, LTD., a California limited partnership; MO-CON VENTURES, INC., GAP DEVELOPMENTS, INC., TWO C MOBILE HOME SALES, INC., SECURITY PACIFIC NATIONAL BANK, a national banking association, CHARLES GILLIARD, JOSEPH R. ALSIP, JR., DALE R. WILSON, ROBERT PLACENCIA, CARROLL D. COURTNIER, EDWARD A. SKIFSTROM, L. R. GABRIELSEN, as Executor of the Estate of Lyman R. Smith, Deceased, ROBERT D. PATTERSON, and EQUITABLE DEED COMPANY, a California corporation. The parent corporation, subsidiaries and affiliated corporations of Respondents SECURITY PACIFIC NATIONAL BANK and EQUITABLE DEED COMPANY are:

Parent Corporation

Security Pacific Corporation

Subsidiaries and Affiliated Corporations

AF, Cargo, Inc.

AF, Freight, Inc.

American Ventures

Atlantic Century Advisers, Inc.

Banco Denasa de Investimento "Denasa"

Banco Security Pacific

Boavista Brazilian Conventional Fund

LIST OF PARTIES (Cont.)

Broadgate Asset Management Limited

Burns Fry Hoare Govett Inc.

Canton Pacific Finance Limited

Canton Pacific Fund Managers Limited

Canton Pacific Nominees Sdn. Bdh.

Canton Pacific Systems Limited

Caribbean Marketing Holdings, Inc.

Caribbean Tourism Holdings, Inc.

Chilgener

China International Finance Company Ltd.

Desturpac

Desturcar

Eden Isles, Inc.

Emerald Corporation

Enersis or Chilmetro

FM Mineral Holdings, Inc.

First Small Business Investment Co. of California

Fulcrom Media Ltd.

GN Mineral Holdings, Inc.

Golf Course, Inc.

LIST OF PARTIES (Cont.)

Hong Kong & Shanghai Insurance Company Limited

InterQuant Capital Advisors Ltd.

Inversiones Financieras Security Pacific Chile S.A.

Lakeside Marketing Company

Leisures Creations

Mexvilla

M & W Resources, Inc.

NBNE

NDC Securities Limited

PNB Securities Corp.

Pacific Century Advisers, Inc.

Pacific Marketing Holdings, Inc.

Pacific Southwest Realty Company

Pacific Tourism Holdings, Inc.

Permit Production Company, Inc.

SECTRAS Corporation

SPAA Leasing, Inc.

SPAC (UK) Corporation

SPBB Leasing, Inc.

SPCC Leasing, Inc.

LIST OF PARTIES (Cont.)

SPFSS, Inc.

Sardonyx Corporation

Security Pacific Asian Bank Limited

Security Pacific Australia Limited

Security Pacific Bank A.G.

Security Pacific Bank Canada

Security Pacific Bank S.A.

Security Pacific Bank & Trust Company (Bahamas) Limited

Security Pacific Capital Australia Limited

Security Pacific Capital Markets Limited

Security Pacific Chile Energia S.A.

Security Pacific Chile S.A.

Security Pacific Chile Valores S.A.

Security Pacific Corporate Services Ltd.

Security Pacific Discount Brokerage Services, Inc.

Security Pacific Do Brazil S/C Ltda

Security Pacific Equipment Finance (Europe) Inc.

Security Pacific Equipment Leasing, Inc.

Security Pacific Finance, Limited

LIST OF PARTIES (Cont.)

Security Pacific Financial Futures, Inc.

Security Pacific Financial Software International, Inc.

Security Pacific Financing Services Limited

Security Pacific Foundation

Security Pacific Futures, Inc.

Security Pacific Hoare Govett Asia Limited

Security Pacific Hoare Govett (Delaware) Limited

Security Pacific Hoare Govett, Inc.

Security Pacific Hoare Govett Limited

Security Pacific Holdings, Inc.

Security Pacific Holdings, S.A.

Security Pacific Hong Kong Holdings Limited

Security Pacific Industrial, Limited

Security Pacific International Bank

Security Pacific International Trade Corporation

Security Pacific Investment Group, Inc.

Security Pacific Investments, Inc.

LIST OF PARTIES (Cont.)

Security Pacific Lease Finance (Europe) Inc.

Security Pacific Limited

Security Pacific Midwest, Inc.

Security Pacific National Leasing, Inc.

Security Pacific New Zealand Limited

Security Pacific Nominees Ltd.

Security Pacific Overseas Corp.

Security Pacific Overseas Investment Corporation

Security Pacific Overseas Investment Corporation BET Gmbh

Security Pacific Overseas Investments Ltd.

Security Pacific Private Capital (Asia) Ltd.

Security Pacific Regional Holdings Limited

Security Pacific Securities Australia Ltd.

Security Pacific Switzerland SA

Security Pacific Trade Finance, Inc.

Security Pacific Trade Finance, Ltd.

Security Pacific Trust (Bahamas) Limited

Security Pacific Video Services, Inc.

LIST OF PARTIES (Cont.)

The Bank of Canton Limited

The Bank of Canton Limited Macao

The Cartwell Syndicate Limited

The Phillipine Fund

Tyrol, Inc.

Videofinancial Services

Villamex

Zedd Investments, Inc.

Zentac Investments, Inc.

Zentac Productions, Inc.

County Service Co.

Security Pacific Commodity Trading Advisors, Inc.

Security Pacific Datacorp.

Security Pacific Commission Merchant, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES x

I NO REVIEWABLE QUESTION IS PRESENTED ... 1

II THE PETITION FOR WRIT OF CERTIORARI DOES NOT SHOW UNITED STATES SUPREME COURT JURISDICTION 3

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

Central Mutual Ins. Co. v. Executive Motor Home Sales, Inc. (1983) 143 Cal. App. 3d 791, 192 Cal. Rptr. 169 4

General Motors Corp. v. Superior Court (1966) 65 Cal.2d 88, 52 Cal. Rptr. 460 4

Moore v. Powell (1977) 70 Cal. App. 3d 583, 138 Cal. Rptr. 914 2

Moran v. Superior Court (1983) 35 Cal.3d 229, 197 Cal. Rptr. 546 4

Price v. Grayson (1969) 276 Cal. App. 2d 50, 80 Cal. Rptr. 602 2

Rodde v. Trousdale Construction Co. (1959) 276 Cal. App. 2d 419, 80 Cal. Rptr. 774 2

Rose v. Knapp (1951) 38 Cal.2d 114, 237 P.2d 981 4

Woley v. Turkus (1958) 51 Cal.2d 402, 334 P.2d 12 4

STATUTES

U.S. Const., amend. XIV 2, 3,

28 U.S.C. § 1257(3) 3, 5

California Code of Civil Procedure Section 583.310 1

California Code of Civil Procedure Section 583.340 1

California Code of Civil Procedure Section 583.360 1

California Rules of Court, Rule 209 1

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

NO REVIEWABLE QUESTION IS PRESENTED

California Code of Civil Procedure Section 583.310 provides: "An action shall be brought to trial within five years after the action is commenced against the defendant." California Code of Civil Procedure Section 583.360 provides for mandatory dismissal if the action is not brought to trial within five years. California Code of Civil Procedure Section 583.340 provides for tolling the five-year period under certain circumstances.

This Plaintiff/Petitioner made no effort to have this case tried within five years of the date of filing, never filed the at-issue memorandum required by California Rules of Court Rule 209[1] as a condition precedent to the Court's assigning a trial date, and waited until five years and 37 days had passed before bringing on its motion to specially set the case for trial. [Petition for Writ of Certiorari, p. 8.]

The Petitioner now presents a petition to this Court requesting factual findings regarding the Petitioner's diligence or lack of diligence during a certain 81-day period during 1982, which period in any event expired more than four years before the case was dismissed for lack of prosecution in 1987.

---

[1] "Rule 209. Memorandum that civil case is at issue (a) [Contents of at-issue-memorandum]. No civil case shall be placed on the civil active list or be set for a trial until it is at issue and a party has served and filed an at issue memorandum stating (1) the title and number of the case; . . . ".

The petition ignores California case law which consistently holds that it is the duty of the plaintiff at all stages of the proceeding to use due diligence in order to prevent the application of the mandatory dismissal provisions. *Moore v. Powell* (1977) 70 Cal. App. 3d 583, 590, 138 Cal. Rptr. 914; *Price v. Grayson* (1969) 276 Cal. App. 2d 50, 53, 55, 80 Cal. Rptr. 602; *Rodde v. Trousdale Construction Co.* (1959) 276 Cal. App. 2d 419, 80 Cal. Rptr. 774.

The petition presents no question which is reviewable by this Court. The questions as framed in the petition attempt to state a violation of due process when the California Court of Appeal upheld the trial court's findings "in egregiously misstating the evidence" regarding the Petitioner's failure to move diligently to have counsel appointed in the bankruptcy court. That is the only claim in the eight "issues" stated in the petition which mentions an issue which could come within the purview of this Court: denial of due process under the Fourteenth Amendment to the Constitution of the United States.

Issues 5 and 6 as stated in the petition, however, do not claim that the Petitioner did not have a fair hearing. Petitioner claims that the trial court's evidentiary findings that Petitioner failed to carry its burden of proving diligence at all stages of the proceeding were so outrageous that the Petitioner was denied due process. Put another way, Petitioner has lost on the evidence and claims that the California Court made such a bad decision on the evidence that the evidentiary findings amounted to a denial of due process.

While the evidence before the trial court clearly showed that the Petitioner was not diligent during any

part of the five-year period within which it could have brought its case to trial, even if there had been some evidence which would have allowed the trial court to find that the Petitioner had carried its burden of proof, the Petitioners' claim would still not show a denial of due process. Petitioner had a hearing before a disinterested magistrate, appeared, presented evidence, failed to carry its burden of proof, and lost. In no sense can the claim be termed a denial of due process under the Fourteenth Amendment. Accordingly, no reviewable question is raised in the petition for writ of certiorari.

II

THE PETITION FOR WRIT OF CERTIORARI DOES NOT SHOW UNITED STATES SUPREME COURT JURISDICTION

The Petitioner's jurisdictional statement cites 28 U.S.C. § 1257(3) for this Court's jurisdiction. It then cites the Fourteenth Amendment to the Constitution of the United States and miscellaneous provisions of federal and state law as the "statutes involved".

The petition for writ of certiorari does not challenge the validity of any state or federal statute. Accordingly, the petition completely fails to show jurisdiction under which a writ of certiorari could be issued.

The Petitioner's arguments rest on the fallacious assumption that this Court may redetermine the facts which led the California court to conclude that the Petitioner failed to carry its burden of proving that it was diligent at all times during the five-year period in seeking

to have the case brought to trial. The law under consideration is set forth by the California courts as follows:

> "The burden is on plaintiffs to first establish in the trial court, by clear and convincing proof, the existence of either impossibility, impracticability, or futility of bringing the matter to trial within five years. Absent such a showing, the five-year statute applies without any further consideration or determination of prejudice." *Central Mutual Ins. Co. v. Executive Motor Home Sales, Inc.* (1983) 143 Cal. App. 3d 791 at 796; 192 Cal. Rptr. 169.

> "What is impossible, impracticable or futile must be determined in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves. (*General Motors Corp. v. Superior Court* (1966) 65 Cal.2d 88, 96, 52 Cal. Rptr. 460; *Woley v. Turkus* (1958) 51 Cal.2d 402, 407, 334 P.2d 12, *Rose v. Knapp* (1951) 38 Cal.2d 114, 117, 237 P.2d 981.) The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case." *Moran v. Superior Court* (1983) 35 Cal.3d 229, 238, 197 Cal. Rptr. 546.

Even if it were inclined to determine whether or not the Petitioner had carried its burden of proof, this Court has no jurisdiction to review the final decision of a California trial court which held that on the evidence, this Petitioner failed to carry its burden of proving due diligence and that this action is subject to dismissal for Petitioner's failure to diligently prosecute.

IV

CONCLUSION

The petition fails to show any question which would give jurisdiction to this Court under 28 U.S.C. § 1257(3). The only questions raised are factual questions which have been finally established by a California trial court and affirmed on appeal by the California Court of Appeal. No reviewable question is properly placed before this Court and accordingly Respondents respectfully submit that the petition for writ of certiorari should be denied.

Dated: April 12, 1989

By ROBERT LOUIS FISHER

BARTON, KLUGMAN & OETTING
333 South Grand Avenue,
37th Floor
Los Angeles, CA 90071-1599
(213) 621-4000

Attorneys for Respondents Security Pacific National Bank, Robert D. Patterson and Equitable Aid Company

APPENDIX

California Code of Civil Procedure § 583.310

"An action shall be brought to trial within five years after the action is commenced against the defendant."

California Code of Civil Procedure § 583.340

"In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) the jurisdiction of the court to try the action was suspended.

(b) prosecution or trial of the action was stayed or enjoined.

(c) bringing the action to trial, for any other reason was impossible, impracticable, or futile."

California Code of Civil Procedure § 583.360

"(a) an action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.

(b) the requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute."

Supreme Court, U.S.
FILED
APR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1557

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HILLVIEW ESTATES, LTD.,

Petitioner,

vs.

MO-CON VENTURES, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND DISTRICT, SIXTH DIVISION

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

C. RUSSELL KING, ESQ.
P.O. Box 888
126 North 8th Street
Santa Paula, California 93060
(805) 525-7138

Attorney for Petitioner
HILLVIEW ESTATES, LTD.

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

QUESTION PRESENTED

What merits are there in repondents' brief in opposition to petitioner's petition for writ of certiorari?

LIST OF PARTIES

The parties to the proceedings are petitioner HILLVIEW ESTATES, LTD., a limited partnership, organized under the laws of the State of California, and respondents: MO-CON VENTURES, INC.; GAP DEVELOPMENTS, INC.; TWO C MOBILEHOME SALES, INC.; SECURITY PACIFIC NATIONAL BANK; CHARLES A. GILLIARD; JOSEPH R. ALSIP; ROBERT PLACENCIA; CARROLL D. COURTNIER; EDWARD A. SKIFSTROM; ROBERT D. PATTERSON; and EQUITABLE DEED COMPANY.

TABLE OF CONTENTS

		PAGE
QUESTION PRESENTED	.....	i
LIST OF PARTIES	.....	i
TABLE OF AUTHORITIES	.....	iv
I.	RESPONDENTS HAVE MISSTATED BOTH FACT AND LAW.....	1
A.	THE REPLY MISSTATES THE QUESTION PRESENTED FOR REVIEW.....	3
B.	RESPONDENTS ALSO MISSTATE THE ORIGINAL DATE OF PETITIONER'S REQUEST TO SHORTEN TIME AND TO SPECIALLY SET THE ACTION FOR TRIAL.....	6
C.	RESPONDENTS HAVE MISSTATED THE LAW RE CALIFORNIA RULE OF COURT 209.....	8
II.	THE TRIAL COURT'S RULING OF THE COURT OF APPEAL DECISION WAS MANIFESTLY UNFAIR THEREFORE IT DENIED PETITIONER DUE PROCESS OF LAW.....	10
A.	THE TRIAL COURT APPARENTLY NEVER CONSIDERED PETITIONER'S PETITION FOR AN EXTENSION OF TIME BASED ON A STAY.....	10
B.	THE TRIAL COURT DID NOT STATE ITS BASIS OF DECISION.....	11

PAGE

C. THE DENIAL OF DUE PROCESS BY THE CALIFORNIA COURT OF APPEAL RESULTED FROM ITS FABRICATING ITS OWN EVIDENCE IN LIEU OF THE EVIDENCE PRESENTED IN THE TRIAL COURT..... 12

D. NEITHER THE TRIAL COURT NOR THE COURT OF APPEAL EVER ADDRESSED THE PRIMARY ISSUE, I.E., WAS THE 81 DAY PERIOD IN WHICH PETITIONER'S APPLICATION WAS PENDING IN THE BANKRUPTCY COURT A STAY THAT TOLLED THE PERIOD OF PROSECUTION OF THOSE 81 DAYS?..... 13

III. THIS COURT'S DECISION IS REQUIRED TO ASSURE THAT CALIFORNIA COURTS COMPLY WITH THE LAW OF STATUTES OF LIMITATIONS AND THEIR LAWFUL EXCEPTIONS..... 14

A. CALIFORNIA COURTS HAVE INTERPRETED STATUTES OF LIMITATION ACCORDING TO EACH JUDGE'S OPINION-- NOT ACCORDING TO LAW..... 14

CONCLUSION 19

TABLE OF AUTHORITIES

PAGE

CASES

Davis v. Thayer (1980)
113 Cal.App.3d 892, 903;
170 Cal.Rptr. 328 18

Hocharian v. Los Angeles
Superior Court (1981)
28 CA3d 714;
170 Cal. Rptr. 790;
621 P2d 829 .....15, 16

Kayes v. Mount La Jolla Homeowners
Assn. (1988) 199 Cal.App.3d 111, 122;
modified in 204 Cal.App3d 1476 ...7, 8

Salas v. Sears, Roebuck & Co.
(1986) 42 Cal.3d 342,
228 Cal. Rptr. 504 ..... 4, 5

Swartzman v. Superior Court In and For
Los Angeles County (1965) 41 Cal.Rptr.
721; 231 CA2d 195..... 9

FEDERAL STATUTES

11 USC 327(e) 14

STATE STATUTES

California Code of Civil Procedure

§583.340(a) 3, 20

§583.340(b) 4, 5, 20

§583.340(c) 4, 5, 6, 20

PAGE

California Rules of Court

Rule 209 ..... 8, 10

Rule 218 9

No. 88-1557

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1988

HILLVIEW ESTATES, LTD.,
a limited partnership,
Petitioner,

vs.

MO-CON VENTURES, INC.,
GAP DEVELOPMENTS, INC.,
TWO C MOBILEHOME SALES, INC.,
SECURITY PACIFIC NATIONAL BANK,
CHARLES A. GILLIARD,
JOSEPH R. ALSIP,
ROBERT PLACENCIA,
CARROLL D. COURTNIER,
EDWARD A. SKIFSTROM,
ROBERT D. PATTERSON, and
EQUITABLE DEED COMPANY,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. RESPONDENTS HAVE MISSTATED BOTH FACT AND LAW.

Petitioner "HILLVIEW" replies to the brief in opposition to petitioner's

petition for writ of certiorari by respondents, SECURITY PACIFIC NATIONAL BANK, ROBERT D. PATTERSON, and EQUITABLE DEED COMPANY. No other respondent objected to that petition. Therefore, all of these respondents are collectively sometimes referred to herein as "SECURITY."

At page i of the opposition, respondents state that the only question presented for review concerns petitioner's burden "of proving its diligence in all stages of the proceeding." That is erroneous as shown in petitioner's petition for writ of certiorari ("petition") pages 33-36. Petitioner is not required to show due diligence of prosecution of its action to obtain the 81-day extension of time beyond the five-year period for bringing its action to trial because there was an implied-in-law stay of the action.

All of respondents' arguments are irrelevant in referring to diligence of prosecution and the impossible, impracticable, and futile basis for extension of time to bring an action to trial. Thus, those arguments are without merit.

A. THE REPLY MISSTATES THE QUESTION PRESENTED FOR REVIEW.

For the convenience of the reader the provisions of extending time beyond the five-year limit for bringing an action to trial are quoted again at this point.

> "In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:
>
> "(a) The jurisdiction of the court to try the action was suspended.

"(b) Prosecution or trial of the action was stayed or enjoined. (Emphasis added.)

"(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile." (Emphasis added.) CCP §583.340

That section is correctly quoted by respondents in their opposition in Appendix 1 (their only appendix).

Note: the word "other" in (c) above was inadvertently omitted at page 16 of petitioner's petition. The reader is requested to insert that word, "other" where shown. Also on page viii of that petition at page 16 should be inserted in the index to show that that section was quoted there.

The provisions for an extension of time based on the impossible, impracticable, or futile provisions (that under Salas v. Sears, Roebuck &

Co. (1986) 42 Cal.3d 342, 228 Cal. Rptr. 504, require a showing of diligence of prosecution) are not applicable to either the suspension of jurisdiction of part (a) or the stay provision of (b). That is obvious by the use of the word, "other" in part (c) that indicates it applies only when either parts (a) and (b) do not apply.

As set forth in petitioner's petition for writ of certiorari, pages 33-36, no requirement of diligence need be shown in prosecution for a period of time tolled because there was an implied-in-law stay of 81 days. That extends time under the provisions of CCP §583.340(b). Respondents obfuscate the issue by their discussion, pages 2, 3, and 4 of the requirement for diligence to be shown at all stages of the proceeding in order to use the provision of CCP

§583.340(c), the impossibility, impracticability, or futility basis for an extension of the five-year period for bringing an action to trial. Therefore, all cases cited by respondents in their opposition are irrelevent. That stay occurred during the five-year period (January 7, 1982, to January 7, 1987). The tolled time is added to the five-year period no matter when during the five year period the tolled time occurred.

B. RESPONDENTS ALSO MISSTATE THE ORIGINAL DATE OF PETITIONER'S REQUEST TO SHORTEN TIME AND TO SPECIALLY SET THE ACTION FOR TRIAL.

At page i of the objection in its question presented for review respondents state that petitioner waited until five years and thirty-seven days until bringing its motion to specially set the case for trial.

Respondents refer to page 8 of petitioner's petition for that statement. To the contrary, on page 7 of petitioner's petition for writ of certiorari, petitioner stated that on December 17, 1986 (22 days before the five-year period ended) it filed its motion to shorten time and to specially set the trial date on January 2, 1987, or five days before the five year period ended on January 7, 1987.

Further, the motion need not be made within the five year period after filing a complaint; it is made within the period of the five-year period plus the tolled period of time. Thus, here it must have been made before March 29, 1987, the date the end of the five-year period was extended for a period of 81 days. See Kayes v. Mount La Jolla Homeowners Assn. (1988)

199 Cal. App.3d 111; modified in 204 Cal.App3d 1476. The second citation did not change the holding, where the motion to specially set the case for trial was made November 25, 1986, one day after the five-year period ended November 24, 1986. There, the appellate court reversed the trial court's dismissal of the action because the motion to specially set was brought within a five-year period plus the tolled time for the period that Kayes sought an extraordinary writ review of the summary adjudication order of the court.

C. RESPONDENTS HAVE MISSTATED THE LAW RE CALIFORNIA RULE OF COURT 209.

Page 1 of respondents' opposition states that California Rule of Court 209 required that an at-issue memorandum to set for trial be filed "as a condition

precedent to the Court's assigning a trial date..." That is a misstatement of the law. California Rule of Court 218 states that:

> "The court may shorten the time to prevent a dismissal under chapter 1.5 (§583.110 et seq.) [this includes CCP §583.340(a)(b)(c)] of title 8 of part 2 of the Code of Civil Procedure or for other good cause shown on noticed motion. The setting for trial shall be by the presiding judge or the presiding judge's designee." Rule 218.

Also see Swartzman v. Superior Court In and For Los Angeles County (1965) 41 Cal.Rptr. 721; 231 CA2d 195, as petitioner stated in its notice of motions, etc. heard March 17, 1987. There, the court stated that:

> "Procedure for special setting by trial judge of case for trial and pretrial is not required to conform in all respects to rules for filing and notice which apply to routine setting by the clerk." 231 CA2d 195,199.

Therefore, the trial court, without requiring petitioner to file the at-issue memorandum of Rule 209, should have shortened time to permit petitioner to bring its action to trial. Thus, petitioner applied within time, when on December 17, 1986, petitioner filed its motion to shorten time, and for special trial setting originally to be heard on January 2, 1987, five days before the expiration of the five-year period.

II. THE TRIAL COURT'S RULING OF THE COURT OF APPEAL DECISION WAS MANIFESTLY UNFAIR THEREFORE IT DENIED PETITIONER DUE PROCESS OF LAW.

A. THE TRIAL COURT APPARENTLY NEVER CONSIDERED PETITIONER'S PETITION FOR AN EXTENSION OF TIME BASED ON A STAY.

Nothing in the record shows that the court considered petitioner's request for extension of time for trial based on the stayed period of 81 days.

That court merely held that a stay did not occur but stated no reason for that holding.

B. THE TRIAL COURT DID NOT STATE ITS BASIS OF DECISION.

The trial court denied petitioner due process because it failed to provide a basis of decision. It either required diligence to be shown during the five-year period that the action was pending in the Ventura County Superior Court between January 7, 1982, and January 7, 1987, or it considered the hearsay on hearsay statement of JILL L. JASPER (petitioner's Appendix "E" to its petition) of the usual procedures of the bankruptcy court in processing an Application to Employ Attorneys that would require only several weeks. Nothing was ever shown by respondent, or by anyone else,

that accounted for the 81-day delay between the mailing of that Application on July 8, 1982, and its approval by the bankruptcy judge, September 27, 1982. As stated in petitioner's petition for writ of certiorari, the doctrine of res ipsa loquitor shows that any negligence was on the part of the bankruptcy court and/or the trustee (petition, pp.24-26.)

C. THE DENIAL OF DUE PROCESS BY THE CALIFORNIA COURT OF APPEAL RESULTED FROM ITS FABRICATING ITS OWN EVIDENCE IN LIEU OF THE EVIDENCE PRESENTED IN THE TRIAL COURT.

Again, petitioner submits that when the trial court stated in its Decision as quoted in petitioner's petition for writ of certiorari at Appendix "B," pages B-4 and B-5, there is no evidence that petitioner had a control--or caused any delay--in

the processing of its Application in the bankruptcy court. Petitioner attempted to show the Court of Appeal that the court had egregiously erred by its petition for rehearing, and its request for findings of fact (petition: Appendix "F").

It was manifestly unfair for the Court of Appeal to fabricate evidence in holding that petitioner was responsible for the 81-day implied-in-law stay of proceeding while its Application was pending in the bankruptcy court. That clearly is a denial of due process of law.

D. NEITHER THE TRIAL COURT NOR THE COURT OF APPEAL EVER ADDRESSED THE PRIMARY ISSUE, I.E., WAS THE 81 DAY PERIOD IN WHICH PETITIONER'S APPLICATION WAS PENDING IN THE BANKRUPTCY COURT A STAY THAT TOLLED THE PERIOD OF PROSECUTION OF THOSE 81 DAYS?

Neither the trial court nor the Court of Appeal indicated whether or not the 81 days was a stay of proceeding qualifying petitioner an extension of that period for bringing its action beyond the five-year period. Therefore, the court's ruling would clarify the federal law under 11 USC 327(e) as to the effect of the delay caused by the bankruptcy court in processing a bankrupt's Application to Employ Attorneys.

III. THIS COURT'S DECISION IS REQUIRED TO ASSURE THAT CALIFORNIA COURTS COMPLY WITH THE LAW OF STATUTES OF LIMITATIONS AND THEIR LAWFUL EXCEPTIONS.

A. CALIFORNIA COURTS HAVE INTERPRETED STATUTES OF LIMITATION ACCORDING TO EACH JUDGE'S OPINION--NOT ACCORDING TO LAW.

Despite the statutory setting forth various time periods

and exceptions thereto, the California courts have ignored both statutory law and case law. That authority to was set forth in Hocharian v. Los Angeles Superior Court (1981) 28 CA3d 714; 170 Cal. Rptr. 790; 621 P2d 829 regarding CCP §581(a). That section then required a summons and a copy of a complaint to be served, and return made, within three years after the action was filed. There, the summons was served "some nine weeks after the expiration of the three years summons service period provided for in Code of Civil Procedure §581(a)." Op. cit, 718. The California Supreme Court stated that a three year statute need not be complied with. The court in an opinion by Chief Justice Bird stated:

"[O]nce a plaintiff has proven his use of reasonable diligence, the trial court still has discretion to dismiss as to the defendant pursuant to section 581a. In exercising this discretion the court must be aware of the fact that it is dealing with two essentially innocent parties--a plaintiff who has demonstrated reasonable diligence and a defendant who has only recently been given notice of the lawsuit. The court must also keep in mind the strong public policy that litigation be disposed of on the merits wherever possible. (Citations omitted.)

"The decision whether or not to dismiss must be based on a balancing of the harm to the plaintiff if the motion is granted against the prejudice to the defendant if he is forced to defend the suit. As long as the court engages in this balancing process, its decision should not be disturbed on appeal absent an abuse of discretion." (Citation omitted.) Hocharian v. Superior Court (1981) 28 CA3d 714; 170 Cal Rptr. 790; 621 P2d 829.

Obviously, the only way to determine whether or not a court had abused its discretion is to appeal the

decision of the lower court. Every judge may have a different opinion as to that balancing process. The result of that decision was to replace certainty of time with uncertainty thereby causing confusion in both Bench and Bar, and to exacerbate an antagonism toward the Bird court by both Bench and Bar. It also encouraged other actions to be appealed from trial courts because any ruling contrary to statutory and case law might be obtained from the California Supreme Court because that decision was such a one. This court may take judicial notice that Justice Bird, who wrote that opinion, together with Justices Grodin and Reynoso (both of whom had later replaced two of the judges who where on the court when that decision was written) were removed by the voters of California in the elections in

November, 1986.

In Davis v. Thayer (1980) 113 Cal.App.3d 892, 903; 170 Cal.Rptr. 328, discussed by petitioner in its petition pages 30-32, neither party in that case raised the possibility that the Government Code had any application to the Code of Civil Procedure. The court raised that part sua sponte. Those two cases, and this case, show the need for certainty in California for cases involving a statue of limitation.

The motto of this court is, "Equal Justice Under Law." It is not "Equal Justice," because without law many persons us will have different opinions of what constitutes justice. It is obvious that the rules must be set forth and be known to the people. As shown above, petitioner submits the rules of law-- that of evidence-- were not followed

by the trial court nor by the Court of Appeal.

CONCLUSION

The opposition of respondents is without merit in every respect. They misstate the basis of petitioner's petition by asserting that diligence must be shown during prosecution, and misstate the law regarding an at-issue memorandum to set for trial.

Petitioner was denied a fair hearing in the trial court that denied petitioner a tolled period of time of 81 days to extend the time for bringing an action to trial; no reason for its decision was stated by that court.

The Court of Appeal then exacerbated the lack of due process by fabricating evidence that was not before the court as to the progress in the bankruptcy court of petitioner's attorney's

Application for their employment.

The state of the law in California with regard to statutes of limitations is uncertain and confusing.

A decision in this case by granting petitioner's petition for writ of certiorari would aid California in restoring the rule of law in judicial interpretation of all statutes of limitations in general, and to matters for extension of time under CCP §583.340 in particular. It would also return to petitioner that due process of law that it was denied by the trial court and the Court of Appeals in the actions herein.

DATED: April 21, 1989

Respectfully submitted,

C. RUSSELL KING